BRB Nos. 98-646
and 98-646A

BERNARD I. SLADE, Jr.	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
Cross-Respondent	)	
	)	
v.	)	
	)	
COAST ENGINEERING and MANUFACTURING COMPANY	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order and Supplemental Decision and Order Awarding Attorney Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

James B. Galloway (Butler, Snow, O'Mara, Stevens & Cannada, P.L.L.C), Gulfport, Mississippi, for claimant.

Christopher A. Davis (Hopkins, Crawley, Bagwell, Upshaw & Persons, P.L.L.C.), Gulfport, Mississippi, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order and employer appeals the Supplemental Decision and Order Awarding Attorney Fees (97-LHC-522) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are

rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). Moreover, the amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was injured on October 6, 1989, when he was working as a leadman on a barge afloat in the Industrial Seaway. He attempted to lift an I-beam, but was unaware that it was still attached to the barge until he put all of his effort into lifting it, injuring his back. Claimant began treatment with Dr. Hopper, an orthopedic surgeon, and underwent back surgery on December 28, 1989. He reached maximum medical improvement on June 20, 1990, and was released to work with restrictions of lifting no more than 35 pounds and limited bending, stooping, squatting and climbing. When he returned to light duty work with employer, claimant was placed in the manufacturing-engineering department, and eventually was moved to the inspection/quality control section. In December 1991, the plant was shut down, and claimant was laid off.

Claimant again sought medical assistance for his back in 1994 and was treated by Dr. Bazzone. Dr. Bazzone performed back surgery on a newly ruptured disc that was located between the two discs that Dr. Hoppper had previously diagnosed as ruptured. Claimant reached maximum medical improvement following this surgery on May 1, 1995, and sought permanent total disability benefits under the Act.[1]

Initially, the administrative law judge found that claimant established coverage under the Act pursuant to Sections 2(3), 33 U.S.C. §902(3), and 3(a), 33 U.S.C. §903(a). He also found that the claim was timely filed pursuant to Section 13 of the Act, 33 U.S.C. §913. The administrative law judge applied the Section 20(a), 33 U.S.C. §920(a), presumption of causation and found that claimant's second surgery, recovery period and resulting disability are related to claimant's October 1989 injury. The administrative law judge found that claimant was unable to return to his former employment following his first surgery, but that

[1]Employer voluntarily paid claimant temporary total disability benefits from October 7, 1989 to July 28, 1990, and from November 8, 1994 to May 23, 1995. Employer paid claimant permanent total disability benefits from May 23, 1995 to June 3, 1997.

he had returned to employer's facility from July 1, 1990 until December 31, 1991, in a position that was not sheltered employment, and thus employer established suitable alternate employment for this period. The administrative law judge rejected employer's contention that claimant did not have a loss in wage-earning capacity during this period and awarded claimant permanent partial disability benefits pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21). The administrative law judge also found that employer's vocational rehabilitation counselor opined that claimant could immediately have found another light duty position after his lay-off, and thus he was entitled only to permanent partial disability benefits following his lay-off until he became totally disabled again on June 20, 1994.

The administrative law judge then found that claimant was again entitled to temporary and permanent total disability benefits, due to the increase in claimant's symptoms, beginning June 20, 1994, and continuing until April 17, 1996, when the administrative law judge found that employer established suitable alternate employment; he thus awarded claimant permanent partial disability benefits from that date and continuing. The administrative law judge found that employer is responsible for all medically necessary care and expenses, including the surgery performed in 1994 by Dr. Bazzone, but excluding the Jacuzzi prescribed by Dr. Jackson, which he found was not medically necessary for claimant's care or recovery. Finally, the administrative law judge denied employer relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f).

In a Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge awarded claimant's counsel a fee in the amount of $8,900, representing 71.20 hours of legal services at the hourly rate of $125, plus expenses in the amount of $142.50.

On appeal, claimant contends that the administrative law judge erred in finding that he was not totally disabled from July 1, 1990 to June 19, 1994, as he contends the light duty work with employer was sheltered employment, and that there was no evidence of any other available jobs during this period. Claimant also contends that the administrative law judge erred in finding that he is entitled only to continuing permanent partial disability benefits after April 17, 1996, as he avers the evidence establishes that he cannot perform any of the alternate jobs identified in employer's labor market survey. Finally, claimant contends that the administrative law judge erred in finding that the Jacuzzi was not a necessary medical expense for which employer is liable pursuant to Section 7 of the Act, 33 U.S.C. §907. Employer responds, urging affirmance of the administrative law judge's Decision and Order. However, in its appeal, employer contends that the administrative law judge erred in awarding claimant's counsel such a large fee given that this case did not contain any novel or complex issues and in light of claimant's limited success. Claimant has not responded to employer's appeal.

Initially, claimant contends that the administrative law judge erred in finding him to be only permanently partially disabled during the period from July 1, 1990 to December 31, 1991, when he worked full-time at light duty for employer for a lower wage. Claimant contends that this work was sheltered employment as he was physically incapable of performing the inspection work and did not have the training or expertise to perform the inspections he was assigned. Claimant also contends that employer did not establish that the light duty work was necessary. As claimant established that he is unable to perform his usual work, the burden shifted to employer to demonstrate the availability of realistic job opportunities which claimant could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 14 BRBS 156 (5th Cir. 1981). An employer's offer of a suitable job within its own facility is sufficient to establish suitable alternate employment, if the job is necessary to employer's operation and claimant is physically capable of performing it. *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 30 BRBS 93 (CRT)(5th Cir. 1996); *Peele v. Newport News Shipbuilding & Dry Dock Co.*, 20 BRBS 133 (1987). That the job may be tailored to claimant's restrictions does not preclude it from meeting employer's burden. *Darby*, 99 F.3d at 689, 30 BRBS at 95(CRT); *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986).

In the instant case, the administrative law judge rejected claimant's argument that the light duty work was sheltered employment and found that, while claimant did not fully use his welding/fabricating experience for the manufacturing/engineering position, he nonetheless testified that he felt like a valuable employee and agreed that he performed the work requested. H. Tr. at 55, 58. Further as a quality control inspector, claimant testified that he used his former welding/fabricating experience. H. Tr. 56. Contrary to claimant's contention on appeal, he never testified that he was physically unable to perform the light duty work assigned. Moreover, the positions to which claimant was assigned were in established departments, and he was performing the same duties as other employees. Therefore, as the administrative law judge considered claimant's contention that the light duty work was sheltered employment and rationally rejected the contention given the evidence of record, we affirm the administrative law judge's finding that the light duty performed by claimant during this period was not sheltered employment. *See Darby*, 99 F.3d at 689, 30 BRBS at 95 (CRT).

Claimant also contends on appeal that the administrative law judge erred in determining the extent of his disability from the time he was laid-off, December 31, 1991, until June 20, 1994, the date the administrative law judge found that claimant again became temporarily totally disabled. As claimant correctly asserts, employer bears the burden re-establishing suitable alternate employment once claimant has been laid off from a light duty position at employer's facility, through no fault of his own. *Vasquez v. Continental Maritime of San Francisco, Inc.*, 23 BRBS 428 (1990); *Mendez v. National Steel & Shipbuilding Co.*, 21 BRBS 22 (1988). Thus, the administrative law judge's finding that

claimant did not establish that he was totally disabled during this period as there was no medical evidence that he could not return to any work is in error. The administrative law judge had already concluded that claimant could not return to his usual duties as a welder-fabricator/leadman, and the burden of proof remained with employer to establish the availability of suitable alternate employment. *Id.*

The administrative law judge, however, continued his analysis and found that employer's vocational expert, Don Carlisle, opined that after the lay-off claimant could have found another light duty position, such as a bench welder position, a job in a welding shop or as a tool room attendant position, such as the one claimant later obtained temporarily.[2] Thus, we will review the administrative law judge's findings to determine whether his conclusion that employer established suitable alternate employment during this period is supported by substantial evidence. The Fifth Circuit has held that an employer may meet its burden of establishing the availability of suitable alternate employment by demonstrating the availability of realistic job opportunities in the local community that are within claimant's physical and mental capacities and which claimant has a reasonable opportunity to secure. *Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT) (5th Cir. 1992); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991).

Contrary to claimant's contention, Mr. Carlisle did address the availability of alternate positions during this period of time. He testified that there would have been numerous jobs available at the time claimant was laid-off, consistent with claimant's 35 pound lifting restriction, which placed claimant in the light to medium category of work. H. Tr. at 98-100. The positions identified included bench welding, work in a welding shop, and tool room attendant, such as the temporary position claimant obtained and successfully performed, as well as positions similar to those claimant performed for employer while on light duty. *Id*. As the administrative law judge credited the vocational expert's testimony that there were jobs available during this period which claimant could perform, based on his physical restrictions, background and experience, we affirm the administrative law judge's finding that employer established suitable alternate employment during the period following

[2]In October 1992, claimant obtained a 15-day position in a tool room, after receiving Dr. Hopper's approval. Claimant testified that the job paid $13.70 per hour, that the job did not entail any lifting, and that he could stand, sit or lie down on a cot while on the job.

claimant's lay-off, January 1, 1992 until June 20, 1994, as it is supported by substantial evidence and claimant has raised no reversible error on appeal. *Guidry*, 967 F.2d at 1045, 26 BRBS at 34(CRT).

Claimant next contends that he is physically incapable of performing the positions identified by Mr. Carlisle in the labor market survey dated April 17, 1996, and thus is entitled to continuing permanent total disability benefits. As claimant established that he could not return to his former longshore work following his second surgery, the administrative law judge reviewed the evidence in order to determine whether employer established the availability of suitable alternate employment. *Turner*, 661 F.2d at 1031, 14 BRBS at 156. In addition to the labor market survey dated April 17, 1996,[3] the record includes medical reports of several physicians and therapists. *See* Cl. Ex. 6; Emp. Exs. 2, 7. Mr. Carlisle testified he took all of the medical opinions into consideration in identifying suitable jobs. H. Tr. at 94-96. Moreover, Dr. Bazzone stated that claimant could perform the positions of drafter, cashier, security guard, reservations clerk, night auditor at a hotel, and desk clerk at a hotel. Emp. Ex. 20 at 13-15. Although Dr. Bazzone did opine early in his deposition that claimant was "probably unable to undertake any type of gainful employment when he left" the doctor's care, Emp. Ex. 20 at 11, he also testified that claimant had the physical capacity to do the jobs identified by employer, with the exception of a clerk at a food mart, due to the lifting required for restocking, Emp. Ex. 20 at 13-16. As the administrative law judge discussed all the relevant evidence and as the record contains substantial evidence supporting his conclusion that claimant could perform the identified alternate employment as of April 17, 1996, we affirm the administrative law judge's finding that employer established the availability of suitable alternate employment, and thus affirm the award of continuing permanent partial disability benefits. *Mendoza v. Marine Personnel Co., Inc.*, 46 F.3d 498, 29 BRBS 79 (CRT) (5th Cir. 1995).

Claimant's final contention on appeal is that the administrative law judge erred in finding that the Jacuzzi prescribed by Dr. Jackson was not a reasonable and necessary expense for which employer is liable. Section 7(a) of the Act, 33 U.S.C. §907(a), provides that employer must furnish medical, surgical, and other attendance or treatment, nursing and

[3]The positions identified include positions in drafting, and as a casino security officer, casino cashier, reservations clerk, night auditor, desk clerk, and a cashier-stock person. The administrative law judge rejected the position of cashier-stock clerk based on Dr. Bazzone's opinion that it would not fit claimant's physical restrictions.

hospital services, medicine, crutches, and apparatus, for as long as the nature of the injury or the recovery process requires. In order for a medical expense to be assessed against employer, the expense must be both reasonable and necessary. *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532 (1979).

In the present case, in a report dated October 3, 1996, Dr. Jackson noted that he strongly re-emphasized the need for continuing exercise therapy program utilizing a heated pool area in addition to the hot tub he recommended for claimant's home use. Cl. Ex. 4. In addition, he wrote a prescription for the Jacuzzi dated November 27, 1996. Cl. Ex. 10. Dr. Bazzone testified that another physician may well feel a Jacuzzi is necessary, but he has found that they are only good for a couple of hours of relief. Emp. Ex. 29 at 21. The definition of medical care includes laboratory, x-ray, and other technical services, prosthetic devices, and any other medical service or supply. 20 C.F.R. §702.401; *see Dupre*, 23 BRBS at 94 (Board held modifications to claimant's house constitute covered medical expenses); *Day v. Ship Shape Maintenance Co.*, 16 BRBS 38 (1983)(Board held that van with automatic lift was covered medical expense); *Miranda v. Excavation Construction, Inc.*, 13 BRBS 882 (1981)(Board held move to warmer climate may be covered medical expense). As the record contains evidence that a qualified physician specifically recommended that claimant use a hot tub in his physical therapy program and prescribed the Jacuzzi for home treatment, and Dr. Bazzone admitted that some physicians find them useful, we must vacate the administrative law judge's finding that employer is not liable for this expense. *See generally Amos v. Director, OWCP*, 151 F.3d 1051, 32 BRBS 144 (CRT) (9th Cir. 1998). On remand, the administrative law judge must reconsider this issue. The fact that the treatment may be only palliative and not curative does not prevent employer from being liable if the expense is reasonable and necessary. The administrative law judge, however, may consider whether the record contains evidence that some other type of treatment or facility would serve claimant's needs as well. *See generally Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112 (1996).

In its appeal, employer contends that the administrative law judge erred in awarding a fee of $8,900, given the limited success claimant obtained and the lack of complexity of this case. The administrative law judge specifically addressed employer's contention that the fee requested was too high in view of claimant's success. He rejected the contention, finding that claimant was successful in his claim as he fully prevailed on the issues of coverage under the Act, the statute of limitations, causation and medical expenses (with the exception of the Jacuzzi). Moreover, although claimant was awarded continuing permanent partial disability benefits rather than the permanent total disability benefits he sought, employer had contested all medical and disability benefits for claimant's second surgery and his condition following the surgery. *See, e.g.*, H.Tr. at 10. The administrative law judge further considered employer's objections to the number of hours spent on trial preparation and found

that given the number of issues raised by employer in this claim, the request was reasonable and necessary under the facts of this case. The administrative law judge did reduce the fee by 5.7 hours in response to employer's objection that the time requested for claimant's brief was excessive. Inasmuch as the administrative law judge specifically addressed employer's contentions, and as employer has not met its burden of establishing that the administrative law judge abused his discretion in awarding a fee of $8,900 in light of the issues raised and claimant's success therein, we affirm the administrative law judge's fee award. *See generally Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]*, 991 F.2d 163, 27 BRBS 14 (CRT) (5th Cir. 1993)*; see also Hensley v. Eckerhart*, 461 U.S. 424 (1983)*; George Hyman Construction Co. v. Brooks*, 963 F.2d 1532, 25 BRBS 161 (CRT) (D.C. Cir. 1992).

Accordingly, the administrative law judge's Decision and Order finding that the Jacuzzi was a not a necessary medical expenses is vacated and the case is remanded for further consideration consistent with this decision. The decision is affirmed in all other respects. In addition, the Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge